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### Summary

Recognizing the Commission's duty to implement regulations aimed at promoting availability of diverse cable programming to consumers, E! Entertainment Television, Inc. ("E!") urges the Commission to do so without jeopardizing sources of capital that are vital new programming initiatives. This goal can be achieved if the Commission restricts only those contracting practices of vertically-integrated program vendors that have the demonstrated purpose or effect that Section 628 seeks to prohibit -- significantly hindering or preventing multichannel video programming distributors from providing satellite cable programming to subscribers or consumers.

In these comments, E! has identified a number of factors that can assist the Commission in distinguishing activities or arrangements more likely to have the prohibited purpose or effect from those that are legitimate and necessary points of negotiation in a business relationship between a program vendor and its distributor/customers. Specifically, differential treatment of distributor/customers by a vertically-integrated program vendor should not be prohibited:

- If a local distributor/customer receives different treatment than a cable system with which the programming vendor has an ownership tie, but the two distributors do not serve the same market.
- When the program vendor is in its start-up phase or otherwise lacks sufficient market share to

affect competition.

- When the term or practice in question is a routine element of relationships between non-vertically-integrated programming vendors and their distributor/customers.
- When a vertically-integrated programming vendor's programs are widely available to distributors with which the vendor has no ownership tie.
- When pricing differentials reflect economies of scale or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by a distributor, with the ability of an advertiser-supported network to add sufficient subscribers to achieve incremental advertising revenues recognized as such a "direct and legitimate economic benefit."
- When differential terms or conditions are contained in existing contracts of reasonable remaining duration.

E! also urges the Commission, in enforcing the regulations, to include measures to prevent the filing of frivolous or unwarranted complaints and to protect the confidentiality of proprietary information.

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JAN 25 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of: )  
)  
Implementation of Sections 12 and 19 ) MM Docket No. 92-265  
of the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
)  
Development of Competition and )  
Diversity in Video Programming )  
Distribution and Carriage )

To: The Commission

COMMENTS OF E! ENTERTAINMENT TELEVISION, INC.

E! Entertainment Television, Inc. ("E!"), by its attorneys hereby offers its comments to the Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding. E!, as one of the newer generation of advertiser-supported basic cable television networks with cable MSO ownership, stresses to the Commission that it could be affected substantially by regulations adopted in response to Section 19 (referred to hereinafter as "Section 628"), the program access provision of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").

- I. The Commission should be guided in its approach by the principal policy objective underlying Section 628.

In adhering to the Congressional mandate to adopt rules implementing the program access section of the Act, the Commission must not lose sight of the principal policy

objective of the statutory provision. The provision is designed to protect the availability of diverse cable programming to the consumer, a goal that Congress believed would be advanced through competition and development of more program distribution outlets. Section 628 itself provides:

(a) Purpose. -- The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

47 U.S.C. § 628(a) (emphasis supplied). <sup>1</sup>

If, in adopting implementing regulations, the Commission drafts restrictions too broadly and focuses on protecting individual competitors rather than on fostering overall competition and program availability, the result surely will be the exact opposite of what Congress sought. Denying programming vendors such as E! the flexibility of contracting that they need to launch, attract capital and attain viability inevitably will lead to a decrease in both the diversity and availability of video programming.

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<sup>1</sup> The stated purpose of the provision is consistent with the purpose of the entire Act, as expressed in Section 521(b)(1) ("promote the availability to the public of a diversity of views and information through cable television and other video distribution media") and also as expressed in the provision's legislative history. In its discussion of vertical integration, the House Report observed, for example, "... competition is essential both for ensuring diversity in programming and for protecting consumers from potential abuses by cable operators possessing market powers." House Report 102-628, p. 44.

The history of E! illustrates why this is true. E! now distributes via satellite a 24-hour advertiser-supported cable network of news and programs about the entertainment industry to approximately 21,000,000 television households. By covering the world of entertainment, E! also provides television viewers a valuable electronic review of current entertainment choices. A relative newcomer to the ranks of satellite networks, E! continues to experience a difficult obstacle faced by creators of new programming -- the ability to increase distribution of the service.

Formerly named "Movietime," the network was launched in July, 1987, and began telecasting movie trailers by satellite. Its founders were a real estate developer and the former manager of a Los Angeles area cable system. Since March of 1988, the channel has received the financial support necessary for its continued development from cable companies willing to risk investment in the network despite increasing obstacles to wider distribution.<sup>2</sup>

In July of 1990 the network's format was changed completely, and the channel was relaunched as E! Entertainment Television. Initially the relaunched service offered rotating short segments of entertainment news and information. Then, in January of 1992, E! changed its

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<sup>2</sup> E!'s MSO investors include Time Warner Cable, Comcast Cable Communications, Inc., Continental Cablevision, Inc., Cox Communications, Inc., NewChannels Corp. and United Cable Television Corp. Home Box Office, Inc. and Warner Communications, Inc. are the remaining investors.

programming format to long-form (hour and half-hour) programs. The commitment to a new format required substantial additional investment in the network, to which the MSO investors again contributed.

Today, from a new, state-of-the-art production facility in Los Angeles, E!'s staff of 350 employees produce some six hours of original programming each day, such as "The Whole World Is Watching," a recent one-hour documentary on the exporting of American entertainment. If E! had not received financial support at certain crucial points in its development, it would have gone the way of The Monitor Channel and other programming services that failed to achieve viability.<sup>3</sup> If the Commission drafts rules making it impossible for vertically-integrated programmers to function in a reasonable, commercial manner, this critical capital source for programming innovation will evaporate.

E!'s success thus far also has depended on attaining exposure in enough cable households to attract advertisers. E! could not have expanded its subscriber base without the ability to provide multichannel video programmers appropriate incentives to carry the network. E! emphasizes that the flexibility of contracting it has required in its continuing

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<sup>3</sup> The Notice indicates an awareness of Congressional findings that "vertical integration in the cable industry has contributed to enhancing development of innovative programming ventures through efficiencies of financing and by compensating cable systems for assuming the risk associated with launching new programming services." Notice, at ¶ 5.

quest for viability does not include denying programming to non-cable distribution services or discriminating in favor of affiliates owned by its MSO investors.

E! is concerned that in adopting its rules, the Commission may inadvertently prohibit or restrict legitimate business and contracting practices that are crucial to the growth and development of programmers but that do not have the effect of destroying competition or depriving consumers of programming. E! urges the Commission to achieve the objectives of Section 628 without jeopardizing the creation and development of new programming services or their widespread availability to the viewing public.

II. Any restrictions that the Commission imposes should be limited to situations where the practice in question has a prohibited purpose or effect.

The regulations adopted in this proceeding should avoid prohibiting practices per se and should limit application of restrictions or imposition of sanctions only to those situations in which a practice has the demonstrated purpose or effect of hindering significantly or preventing any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers. Section 628(b) clearly supports this approach.

E! submits that there are a number of circumstances in which prices or other contract terms or conditions may differ among a vendor's customers but are not the result of a

prohibited purpose or intent and would not result in the effect Congress sought to prevent. For instance:

A. Offering Different Terms to Distributors That Are Not Direct Competitors:

An advertiser-supported network's primary business objective is to reach the greatest number of viewers. Thus, it should not matter if a programming vendor treats local distributors differently when they are not in competition, i.e., in areas in which the distributor/customer alleging discrimination or unfair treatment is not competing with a cable system with which the programming vendor is affiliated through common ownership. The fact that a national program vendor is an affiliate of a cable operator in one city has no bearing on the vendor's negotiations with potential distributors of its service in other cities. The only anticompetitive harm, if any, would be price differentials between competing distributors in the same market. Accordingly, the program access regulations should be limited solely to circumstances where a vertically-integrated cable system serves substantially the same geographic area as a competing distribution system.

B. Contracting Practices or Issues of Start-up Services or Services with Insufficient Market Share to Affect Competition:

The Commission should adopt a safe-harbor exception to any restrictions for start-up program services or other program vendors that do not have sufficient market share to adversely effect competition or to deprive consumers of

programming.<sup>4</sup> There are nearly 60,000,000 cable households in the U.S.<sup>5</sup> Like E!, most of the newer generation of cable programming services as well as lower-rated services that "narrow cast" specialty programming, are available in less than half of those households.<sup>6</sup> E! urges the Commission to adopt a safe-harbor based on penetration of under 50% of cable households (or approximately 30,000,000 homes served), which is the true level at which most new services will achieve profitability and the ability to pay a return on investment to their owners.<sup>7</sup>

C. Absence of Prohibited Purpose or Intent.

In addition to examining the programming vendor for evidence of market power or opportunity to disadvantage a direct local competitor of a cable system with which it has

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<sup>4</sup> The passage from the House Report cited in footnote 1, supra, demonstrates that the provision is primarily concerned with preventing abuses by cable operator/programmer combinations with market power.

<sup>5</sup> Cable Television Developments, National Cable Television Association, October 1992.

<sup>6</sup> According to a November 1992 Cable Network Census published by Paul Kagan Associates, Inc., the following are among those services that have smaller market shares but nevertheless represent hundreds of millions of dollars in investment: Comedy Central (26.2 million households); Mind Extension University (21.9 million households); The Learning Channel (18.4 million households); The Travel Channel (17.5 million households); Nostalgia (14 million households); Sci-Fi Channel (10 million households); Bravo (9.5 million households); and Court TV (7.6 million households).

<sup>7</sup> Market share should not, however, create a presumption of market power for programmers who exceed 50% penetration.

an ownership tie, the Commission also should look for indicators of an absence of prohibited purpose or intent. One such indicator might be the frequency with which a particular practice or differentiation in treatment of various customer/distributors occurs in customer relationships of other program vendors that are not vertically integrated with cable companies. In addition, the Commission could look to the overall practices of the vertically-integrated vendor in question. Routine or widespread availability of a programming vendor's product to non-cable distributors or to cable systems with which the vendor has no ownership tie on terms that enable those distributors to offer satellite programming to consumers is strong evidence of an absence of a prohibited purpose or intent.

D. Pricing Differentials

The Act recognizes the legitimacy of price differences among cable distributors and between cable and non-cable distribution systems. There are a number of circumstances in which such differences are totally justified and, in fact, beneficial, but lack anti-competitive purpose. E! believes that the circumstances addressed in Section 628(c)(2)(B)(iii) -- where a price differential reflects "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor" -- is extremely important.

Other comments submitted in this proceeding no doubt will describe the differences in cost that programmers encounter in dealing with different distributors of their programming. Without going into detail, E! would generally add that it, too, experiences economies of scale in dealing with large distributors as opposed to small and in dealing with cable television systems as opposed to non-cable distribution outlets. The Act permits these differences to be taken into account when distinguishing legitimate, permissible price differentials from impermissible ones that are intended only to impede competition. E! urges the Commission to take these differences into account in its rules as well.

The statute also permits price differentials when there are "other direct and legitimate economic benefits" reasonably attributable to the number of subscribers served by the distributor. For an advertiser-supported network such as E!, the chief benefit attributable to the number of subscribers served by a distributor is audience exposure. E! achieves genuine economic benefit in the form of incremental advertising revenue when it adds a sufficient number of subscribers. Accordingly, E! submits that a volume discount based on the size of the subscriber base, which is an important incentive to a programming service trying to achieve or maintain viability, is a completely legitimate

form of price differential and should be recognized by the Commission as such.<sup>8</sup>

IV. The Commission should allow existing contracts to remain in effect.

E! agrees with the Commission's tentative conclusion that "any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts." Notice at ¶27. E! typically enters into distribution agreements with affiliates for five years' duration. E!'s production budget as well as its negotiations for acquisition of programming and related rights all are based on the expectation of receiving certain revenues from affiliates and the expectation of exposure to a certain subscriber base. That these expectations will be a reality is insured through binding contracts with affiliates. For the Commission to allow existing contracts to be opened up at this point would be highly disruptive. As illustrated above, programming is an inherently risky undertaking. In order to attract capital or to justify large expenditures required for development of programming, program vendors need the amount of certainty that comes from a reasonable contract term. On the other hand, allowing contracts of the duration of E!'s typical affiliate arrangements to continue in effect

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<sup>8</sup> With maximizing audience exposure in mind, E! submits that price differential incentives also might be justified based on conditions of carriage, such as the tier or channel placement to which a particular distributor agrees.

until expiration would not unduly delay implementation of Congressional policy.

- V. The Commission needs orderly procedures for dealing with bona fide complaints and for protecting business confidentiality.
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Once the Commission has established its guidelines, there remains the issue of how to handle complaints. Here, E! has two concerns:

A. Frivolous or Unwarranted Complaints

First, E! is concerned with the potential for being tied up in a proceeding that is the result of a frivolous or unwarranted complaint. (Being flooded with frivolous complaints obviously is a concern of the Commission as well.) E! submits that the guidelines set forth above will assist in deterring frivolous or unfounded complaints. Nevertheless, whenever a new form of recourse becomes available, there will no doubt be attempts to use the process to solve a complainant's problems, whether or not those problems are the result of the practices or activities the process was designed to address. The Commission obviously must design some mechanism for distinguishing legitimate complaints from those that are either frivolous or otherwise unwarranted. In order for the Commission to entertain a complaint, the complainant must, at a minimum, demonstrate that it does or will actually compete for the sale of programming to consumers with a cable system holding an attributable

interest in the program service in question. Ideally, the complainant also should demonstrate actual harm -- for example, identification of subscribers it has lost as a result of not being able to offer the programming service in question or being unable to obtain that programming service on terms that are not discriminatory. Alternatively, the complainant must do more than speculate. Where actual harm has not yet occurred, the threshold for establishing the likelihood of harm should be high. If the complaint does not reach this threshold, it should not be considered a prima facie case and should be dismissed.

B. Protection of Confidential Information

E!'s second area of concern is disclosure of proprietary or confidential information in the course of defending a complaint. Again, it may be tempting for certain distributors to use the complaint process as an opportunity to go on a "fishing expedition" for information that will result in a business advantage. Once the Commission has determined that a complainant has met its threshold and is entitled to engage in discovery, E! urges the Commission to include in its procedures appropriate safeguards for the confidentiality of proprietary information. Such safeguards should include strict limits on the distribution and disclosure of information produced in discovery by the parties and by Commission personnel. Routine use of a

standard protective order, with stringent penalties for those who violate its terms also would be advisable.

VI. CONCLUSION

Recognizing the Commission's duty to implement regulations aimed at promoting availability of diverse cable programming to consumers, E! urges the Commission to do so without jeopardizing sources of capital that are vital to the creation of new programming. This goal can be achieved if the Commission restricts only those program contracting practices that have the demonstrated purpose or effect that Section 628 seeks to prohibit -- significantly hindering or preventing multichannel video programming distributors from providing satellite cable programming to subscribers or consumers. E! urges the Commission to distinguish activities or arrangements that have the prohibited purpose or effect from those that are legitimate and necessary points of

negotiation in a business relationship between a program  
vendor and its distributor/customers.

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